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Supreme Court of the United States

OCTOBER TERM, 1958

No. 267

ANDREW J. SCOTT,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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ANDREW J. SCOTT,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

ANDREW J. SCOTT, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Louisiana, entered in the above entitled case on April 27, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, including the extract from minutes wherein rehearing was refused, contained in Appendix hereto, is reported in 110 So. (2d) 530.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered March 23, 1959; all of which appears from a certified copy of extract from the minutes of the Supreme Court of Louisiana, annexed hereto. The jurisdic-

tion of this Court is involved under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

Whether there was systematic exclusion, or only token representation, of Negroes in the official selection of Grand Juries and Petit Jury venires in the Parish of Livingston, Louisiana, where the system that was consistently followed as long as any man remembers had permitted only one Negro to serve on a Grand Jury and no Negroes to serve on any petit jury venire for criminal trials; and which constituted a systematic exclusion of Negroes because of race, creed or color and in violation of the guaranteed equal rights of petitioner under the constitution and Statutes of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved include the Fifth and Fourteenth Amendments to the Constitution of the United States, and Act of Congress, 18 Stat. 336. 8 U.S.C., Section 44 and Article 1, Section 2 of the Louisiana Constitution, printed in Appendix hereto.

STATEMENT OF THE CASE

The petitioner herein, Andrew J. Scott, a young colored male, who was of the age of twenty (20) years at the time, was indicted by the Livingston Parish Grand Jury, charging him with the crime of aggravated rape of a white female by the name of Mrs. Larecy Blount Graham at her residence on Corbin North Road approximately six miles north of the unincorporated village of Corbin, on the 19th day of October, 1957. That the said Andrew J. Scott is a member of the Negro race and had been a resident of the City of Baton Rouge and Parish

of East Baton Rouge, Louisiana, for all of his lifetime of slightly more than twenty years. The significant facts surrounding this charge are that the complainant, sometime between the hours of two and three p.m. of the alleged afternoon of October 19, 1957, first reported that she had been attacked by a negro man, whom she claimed had walked into her home, with a cloth mask tied over his face, while she was ironing. There was considerable confusion as to the extent of the attack first reported by complainant, in her first outcry as the two Baton Rouge newspapers published reprinted reports in several issues that a "Baton Rouge Negro Held in Livingston for ATTEMPTED Rape", two of which clippings were admitted in evidence on trial of motion for change of venue, without objection by State.

Prior to the opening of trial there were four motions filed on behalf of defendant, including a motion for a bill of particulars prior to arraignment which the State answered, only in part, and which the Trial Court upheld and let stand, to which ruling counsel for defendant duly excepted and reserved a formal bill of exceptions.

Also, prior to arraignment a motion to quash the indictment was filed on behalf of defendant and upon arraignment petitioner entered a plea of "not guilty". Before trial began a motion for change of venue and motion to quash the array or regular petit jury venire, were filed. The last three motions were overruled by the Court and to which rulings defense counsel duly excepted and reserved formal bills of exception to each ruling respectively. And after trial, but before sentence was imposed, a motion for a new trial and a motion in arrest of judgment were filed by defense, both of which were overruled and to each of which rulings counsel like-

wise exception and reserved formal bills of exception, thereto.

That the hearing and trials on the preliminary motions together with the trial of the alleged charge together extended over a period of ten days during which hearings and trials there were numerous material errors made in the proceedings, which defense counsel contends are reversible errors and to which exceptions were taken timely during trial and covered in eleven formal bills of exception and a substantial number of which reversible errors were grouped and covered in formal bill of exceptions numbered five based on 17 defense reasons set up in, and on which his motion for a new trial was based and urged to the Court at the hearing thereon. And most all of which reasons were discussed in the argument on other bills, other than the bill of exceptions numbered five.

And also, a substantial number of these material errors were likewise grouped and urged on appeal in defense bill of exceptions numbered 11, which formal exception is based on the objection of defense to the verdict and the imposition of sentence, thereon, for the reason that the verdict herein was contrary to both the law and the evidence, which objection was overruled by the Court and a formal bill of exceptions duly taken and reserved thereto, and based on the entire record of the case, which is duly attached to, and included, *in extenso*, in said bill of exceptions numbered eleven, in the appeal herein, to the State Supreme Court.

Then on September 15, 1958, the Court immediately proceeded to pass sentence on defendant, and imposed a sentence carrying the death penalty by electrocution.

And to which sentence defendant through his coun-

sel, filed a written motion for an appeal to the Supreme Court of Louisiana with an order, in blank, attached, which motion for appeal was duly granted and the order for same signed and issued, by the Court on the 19th day of September, 1958.

The facts as reflected in the transcript show that defendant was in Livington Parish on the alleged afternoon of October 19, 1957, and directed and sent there by his Baton Rouge employer, with approximately one-half dozen orders of new automobile tires to be delivered to different customers of B. F. Goodrich Company of Baton Rouge, which customers are located along U. S. Highway 190 at Denham Springs, Walker and Livington, Louisiana, and with other instructions to put air in certain truck tires, of certain customers, particularly truck tires of the Hurst Pole Company, at, or near, the Town of Walker, Louisiana. And the testimony of three State witnesses, corroborated by the testimony of defendant, reflected that, from the time of 1:30 p.m. to 3:05 p.m. of the afternoon of the alleged attack defendant was making a delivery of new tires and putting air in six-wheel high pressure truck tires of the Hurst Pole Company at Walker, Louisiana, with a portable air pressure machine, and making deliveries of other new tires to another customer in Walker, Louisiana, and traveling along Highway 190 the approximate distance of six miles from Hurst Pole Company to the Town of Livingston, Louisiana, where his final two new tire deliveries were made to Pope's and Loyd's service stations, respectively, at approximately 3:00 to 3:05 p.m. of aforesaid afternoon, and during this above time from 1:30 p.m. to 3:05 p.m. and during that entire lapse of time of one hour and thirty-five minutes transpiring between the time of 1:30 p.m. and 3:05 p.m., the State and defense evidence

showed defendant was at least six miles, or more, from the residential location of the alleged crime and never coming closer than six miles at the nearest point as he drove along the main highway between the village of Corbin, Louisiana and the town of Livingston, Louisiana.

And very soon thereafter, and at the approximate hour of 4 p.m. defendant was arrested by a Deputy Sheriff of Livingston Parish, Louisiana, as he turned into the private driveway or lane leading to the plant of Hudson Sand and Gravel Company, Denham Springs, Louisiana, where defendant was attemtping to make his last and final call and delivery for the day. Whereupon, defendant was placed in the Deputies' car and driven back toward Livingston during which ride defendant was questioned severely as to what he had been doing and his mission and whereabouts in Livingston Parish for the previous several hours and during all the interrogations he was punched violently many times while he was being threatened at periodic intervals with an officer's heavy billet club or stick, and finally driven to a country residence along a gravel road, extending north several miles from Highway 190, where he was further questioned and an attack was attempted on him, aimed and directed at his throat, by a white man armed with an open blade knife, which violent attack was prevented only by the alterness of officer B. K. Stewart, one of the investigating deputies who also, examined and observed defendant's eyes and turned to one of his fellow officers and remarked, "there ain't nothing wrong with this nigger's eyes so we just as well turn him aloose". Whereupon, his fellow officer in reply said "we had better let the woman (complainant) look at him. Thereupon, a woman was called from inside the residence, who came towards the Sheriff's car, pointed a finger towards the rear seat of the car where defendant was seated and she

announced, "that's the nigger, that's the black bastard, and you gonna burn nigger".

Then defendant was placed under arrest and soon after that he was asked if he would sign a statement, "that he had gone in that particular house to take or steal something", which defendant refused to sign for the reason, he told them, "he had not gone into that house and had never been there before they took him there and he would not sign anything he did not do even if, they would promise to turn him aloose". Defendant never at any time made any confession or any admission that would, in any way, tend to show or indicate guilt of this charge. And no confession, admission, finger-print or line-up identification of the accused defendant was ever offered in evidence nor ever claimed to have been taken from him, or given by him, when he refused to sign a confession "the Deputy Sheriff called petitioner a liar and he was beaten".

Thereupon, the defendant was placed in the Livingston Parish jail and held by the Sheriff originally on a complaint of an "attempt to commit aggravated rape", however, defendant was later indicted for aggravated rape, as stated hereinabove, and the prosecutrix did testify on the trial that she was actually raped. And the jury did bring in a verdict, thereon, as is also stated and set out hereinabove.

The trial of the defendant commenced on March 18, 1958. On March 26, 1958, the petit jury returned a verdict of guilty as charged against petitioner.

On June 23, 1958, the petitioner filed a motion for a new trial and a motion in arrest of judgment, which were denied. Petitioner filed all formal bills of exception,

including those based upon the motion to quash the indictment, the motion to quash the venire and motion for a change of venue, and the adverse rulings on the evidence during the hearings and trial on the merits.

A suspensive appeal to the Louisiana Supreme Court was lodged before the trial Court and granted, and a brief was filed in the Supreme Court of Louisiana, Case No. 44,361, in which the aforesaid bills of exception based upon the aforesaid constitutional question were presented, and on February 20, 1959, counsel for petitioner argued these issues before the Supreme Court of Louisiana.

On March 23, 1959, the opinion of the Louisiana Supreme Court was rendered, affirming the conviction of petitioner and on or before April 6, 1959, application for rehearing based upon the aforesaid constitutional questions was timely filed in behalf of petitioner, and on April 27, 1959, a rehearing was denied the petitioner by the Louisiana Supreme Court. Thereupon on same date of April 27, 1959, a petition, to stay the mandate of the Louisiana Supreme Court until such time as the United States Supreme Court would be petitioned upon application for writs of certiorari and review, or appeal, was filed before the Louisiana Supreme Court, which on the last aforesaid date granted petitioner a stay of execution for ninety (90) days from April 27, 1959.

REASONS FOR GRANTING THE WRIT

For a long and continuous period of time it has been the adopted custom in the Parish of Livingston to exclude Negroes from all types of jury service prior to the selection of the Grand Jury which returned the indictment herein against petitioner on the date of December 6, 1957, charging petitioner with the henious capital offense

of aggravated rape, which was alleged to have been committed on the prior date of October 19, 1957.

And on this grand jury panel appeared the name of only one member of the Negro race, although the official records of the Registrar of Voters for the Parish of Livingston, State of Louisiana, who keeps the only recorded and official written records of any adult Negro residents of that particular Parish, and more particularly, who are qualified to vote, and are able to read and write and have signed their respective names and made oath that they have reached their full majority and had at least one year or more of immediate previous residence in said parish, all of which meets the fixed legal qualifications of a resident for any type of jury service in the State of Louisiana, showed conclusively, that there were at least four hundred and five (405) Negroes registered and qualified to vote in the Parish on what the Registrar testified was only a partial registration or an early and a "short" registration which had accumulated long before any designated election day was approaching. Whereas the same Livingston Parish voter registration rolls showed a total voter registration of slightly less than forty six hundred (4600) white registrants at the same time as the Negro registrants of Livingston Parish were tabulated and testified to, on the hearing immediately before the beginning of the trial of petitioner on the merits.

The only conclusion that is possible to draw from these facts is that there has been systematic, unlawful, unconstitutional, and prejudicial exclusion of Negroes from the Grand Jury of Livingston Parish, contrary to the Constitution of Louisiana (Article 1, Section 2) and the Fifth and Fourteenth Amendments to the Constitution of the United States.

The question of unlawful discrimination in selection of grand juries is not novel to the jurisprudence of Louisiana or of the United States. Cases are legion in which the United States Supreme Court has declared that convictions of Negroes for slaying or raping of whites cannot be countenanced when, in obtaining the conviction, the Constitution has been violated. The Supreme Court of Louisiana has followed this principle in some cases in which discrimination was shown. *State of Louisiana v. Anderson*, 205 La. 710, 18 So. (2d) 33; *State of Louisiana v. Nichols*, 216 La. 622, 44 So. (2d) 318.

Therefore the decree of the Louisiana Supreme Court in the instant Scott case is erroneous, as it is in conflict with prior decisions of the State of Louisiana as well as decisions of the United States Supreme Court.

One of the most famous cases dealing with the subject of Negro discrimination in the selection of the Grand Jury, which was ultimately decided in the United States Supreme Court, was the case of *Norris v. Alabama*, 294 U.S. 587; often referred to as one of the "Scottsboro Boys" cases. Mr. Chief Justice Hughes, in delivering the opinion of the Court, (294 U.S. 587, 598) cited the basic principle as pronounced by the Supreme Court in *Carter v. Texas*, 177 U.S. 442, in relation to the systematic exclusion of Negroes from service on grand juries, which is, as follows:

> "Wherever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the law is denied to him, contrary to the Four-

teenth Amendment of the Constitution of the United States. *Strauder v. West Virginia*, 100 U.S. 303; *Neal v. Delaware*, 103 U.S. 370; *Gibson v. Mississippi*, 162 U.S. 565. This statement was repeated in the same terms in *Rogers v. Alabama*, 192 U.S. 226, and again in *Martin v. Texas*, 200 U.S. 316."

In the *Norris* case, the Supreme Court found that no Negro had served on any grand jury in that county within the memory of witnesses who had lived there all their lives, and that in view of there being qualified Negroes in the county this testimony alone made out a *prima facie* case of the denial of equal protection which the Constitution guarantees. Nor was the *prima facie* case overthrown by the fact that the Alabama statutes fixed a high standard of qualifications for jurors and that the jury commission was vested with a wide discretion.

Within three years after the *Norris* decision, our Louisiana Supreme Court decided the case of *State of Louisiana v. Pierre*, 189 La. 764, 180 So. 630 arising from a capital conviction in St. John Parish. The State Supreme Court at 189 La. 774, chose to distinguish the case from the *Norris* case by showing that there were few qualified Negroes in this small parish, and denied the defendant's plea. However, the case went to the United States Supreme Court on certiorari, *Pierre vs. Louisiana*, 306 U.S. 354, 59 S. Ct. 536 (1938), and the case was remanded upon a finding of systematic and unconstitutional discrimination in accordance with the rule of *Norris v. Alabama* and others. **Pierre** was tried and convicted a second time on an indictment by a grand jury after the discrimination procedures were corrected in accordance with the mandate of the United States Supreme Court handed down in the first *Pierre* case.

See *State of Louisiana v. Pierre*, 198 La. 619, 3 So. (2d) 895.

The instant case is also in violent conflict with the case of *Smith v. Texas*, 311 U.S. 128; 618 S. Ct. 164; 85 L. Ed. 84 (1940), where during 1931-1938, five (5) Negroes actually served on grand juries in Harris County, Texas; yet the United States Supreme Court held that was only a token representation which was still tantamount to racial discrimination. Mr. Justice Black, in the *Smith* case said:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. **But by the reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to prescribe any group thought by the law's administrators to be undesirable.**" (Emphasis ours)

The Court further said:

> "Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service."

And in concluding his opinion, Mr. Justice Black said:

> "Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, **discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.**" (Emphasis ours)

There is no doubt that the Louisiana method of

selecting grand juries places wide discretion in the hands of its judges. But, such discretion is bound on all sides by the Fourteenth Amendment and must be exercised within its limits and limitations.

Following the list of cases from which counsel has heretofore quoted pertinent excerpts is the case of *Reece v. Georgia*, 350 U.S. 85; 76 S. Ct. 33; 100 L. Ed. 1 (1955), wherein Mr. Justice Clark held that " * * * mere assertions of public officials that there has not been discrimination will not suffice * * *".

2. Clearly, the question presented here is of the utmost importance, not merely to this petitioner, and not only to the vast numbers of Negroes who have a right to expect equal protection of the laws, but also to every class of person whose inalienable rights could be breached and violated by any plan, however "ingenuously or ingeniously" devised, which could discriminate against their class.

As was said by Mr. Chief Justice Stone in *Hill v. Texas*, 316 U.S. 400, 62 S Ct. 1159, 86 L. Ed. 1559 (1941):

> "Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."

A more recent case, in which the question of systematic exclusion of Negroes from grand jury service was passed upon by this Honorable Court is another Louisiana case which had its origin in the Parish of Orleans and City of New Orleans, Louisiana, and which

reached the Honorable United States Supreme Court on writ of certiorari and review, directed to the Honorable Louisiana Supreme Court is the case of *Freddie Eubanks, petitioner, vs. State of Louisiana,* (No. 550 Oct. Term, 1957) May 26, 1958, 356 U.S. Reports 584, and *State of Louisiana vs. Freddie Eubanks,* 232 La. 289, 94 So. 2d 262; and in which last cited case the record disclosed that only one Negro had been selected for grand jury service, within the memory of any man, and the selection of that particular Negro was by reason of the mistaken identity by the presiding District Judge. And even though it was established that in a number of instances that several Negroes were drawn on the respective grand jury panels of seventy five names from which the grand juries of twelve members each were drawn for actual grand jury service constituted systematic exclusion of members of the Negro race.

Whereas, in the instant Scott case the record shows only one Negro had been drawn for any type or form of jury service in criminal prosecutions in Livingston Parish, Louisiana.

And it further appears from the record in the *Eubanks* case that the names of six (6) Negroes were actually drawn from the general venire list, or Jury wheel, and placed on the grand jury panel list of seventy five names from which the presiding district Judge finally selected the twelve (12) grand jurors, who officially served and returned the indictment against the accused Eubanks, all of which indicates that the jury commissioners of Orleans Parish were placing substantial numbers of names of Negroes on the general venire lists and in the jury wheel, respectively, yet through custom and tradition the respective District Judges of the Criminal District Court of Orleans Parish were systematically

excluding the known Negroes from actual grand jury service for Orleans Parish, Louisiana. And under this circumstance and traditional system the accused, Eubanks, was indicted, tried, convicted and sentenced to death. The Louisiana Supreme Court affirmed, holding that "the record disclosed no discriminatory exclusion of Negroes from his grand jury", 232 La. 289, 94 So. 2d 262, and upon which judgment and decree the United States Supreme Court granted certiorari, 355 U.S. 812. And upon final disposition of the said writ and ruling upon the above set forth judicial system and practice in a very learned and cogent opinion Mr. Justice Black in His conclusion of a very pertinent part of the unanimous opinion of the Supreme Court pronounced the established law applicable, when Negroes have been consistently barred from jury service because of their race, as follows, to-wit:

> "It seems clear to us that Negroes have been consistently barred from jury service because of their race.
>
> "It may well be, as one of the parish judges recently stated, that 'the selection of grand juries in this community throughout the years has been controlled by tradition, and the general thinking of the community as a whole is under the influence of that tradition.' **But local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of law.**
>
> "A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for (the State) may indict and try him again by the procedure which conforms to constitutional requirements. **But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to**

grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty." *Hill v. Texas*, 316 U.S. 400, 406. (Emphasis ours)

"The judgment of the Louisiana Supreme Court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

IT IS SO ORDERED"

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

s/ HARRIS M. ENGLISH

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s/ W. T. BENNETT

W. T. Bennett,
Counsel for Petitioner.

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the Constitution of the United States

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immenities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

18 Stat. 336, 8 U.S.C. Section 44

"No citizen possessing all other qualifications . . . shall be disqualified for service as Grand or Petit Juror in any Court of the United States, or of any State, on account of race, color, or previous condition of servitude; . . . "

Article 1, Section 2, Constitution of Louisiana

"No person shall be deprived of life, liberty, or property, except by due process of law."

MONDAY, MAR. 23, 1959

SUPREME COURT OF LOUISIANA

No. 44,361

STATE OF LOUISIANA

vs.

ANDREW J. SCOTT

APPEAL FROM 21st JUDICIAL DISTRICT COURT FOR THE PARISH OF LIVINGSTON, STATE OF LOUISIANA—HONORABLE H. R. REID, JUDGE.

McCALEB, Justice.

On October 19, 1957, at about 2:00 p.m., appellant, a 20-year old negro, accosted Mrs. Larcey Blount Graham, a white woman, at her residence located in a rural area of Livingston Parish. At the time he made his presence known, appellant was wearing a cloth mask and, when Mrs. Graham screamed, he struck her and her two children, aged seven and four, who were on the scene. After threatening Mrs. Graham and her children with an iron chisel he dragged her into a bedroom, where he raped her. Later in the day, appellant was apprehended for the crime and, on December 6, 1957, he was indicted for aggravated rape. A trial resulted in a verdict of guilty and, following the pronouncement of a death sentence, this appeal was prosecuted, in which appellant is relying on 11 bills of exception for a reversal of his conviction.

The first bill was reversed to the overruling of a

motion to quash the indictment. This motion, while predicated on several grounds, was primarily levelled at the alleged insufficiency of the indictment to inform appellant of the nature of the charge against him.

The indictment is couched in the short form provided by Article 235 of the Code of Criminal Procedure (R.S. 15:235) and charges that, on the 19th day of October, 1957, appellant "Did commit aggravated rape upon Mrs. Larecy Blount Graham at her residence about six miles north of Corbin, Louisiana in violation of Article 42 of the Louisiana Criminal Code."

The short form for aggravated rape was tested and approved in *State vs. Chanet*, 209 La. 410, 24 So. (2d) 670. Hence, it would serve no useful purpose to further discuss the question, particularly since counsel for appellant quotes the Chanet case in full in his brief and seemingly relies on it in support of his argument. This argument appears to be based on the premise that, although the use of the short form is not objectionable, appellant was entitled to a bill of particulars, which the judge ordered the State to furnish, and that, since the State did not fully comply with the judge's order, the indictment is vulnerable and should be quashed. Stated in another way, counsel is apparently contending that, since appellant is entitled under the Chanet and other cases to a bill of particulars as a matter of right when the charge is drawn under a short form, the failure of the State to supply all of the particulars requested by him has the effect of rendering the indictment invalid

There is no merit in this proposition. The failure of the State to furnish the particulars requested by a defendant, who is charged under a short form, does not affect the validity of the indictment, as it is now well

settled that a bill of particulars does not amend an indictment nor can it cure or aid its insufficiency in law. See *State vs. Dabbs*, 228 La. 960, 84 So. (2d) 602; *State vs. Straughan*, 229 La. 1036, 87 So. (2d) 523 and *State vs. McQueen*, 230 La. 55, 37 So. (2d) 727. If the particulars furnished by the State do not give the accused all the information to which he is entitled and the judge will not require the district attorney to supply them, the remedy of the accused is to except to the judge's ruling so that it may be reviewed on appeal.

Before terminating our discussion of the motion to quash, we note that that appellant has also assailed the indictment on the ground that there has been a systematic exclusion of members of the negro race in the selection of the general venire by the jury commission.

This charge, which is made the subject of another bill of exceptions, cannot be considered on a motion to quash the indictment. Articles 202 and 203 of the Code of Criminal Procedure (R.S. 15:202 and 203) point out the procedure or making objections to an array or venire and the time when such objections are to be pleaded. Denial of equal protection of the law cannot be raised on a motion to quash an indictment, which addresses itself to the legal sufficiency of the pleading on its face and not to disqualification of the personnel bringing the charge, which can only be ascertained by proof.

Bill of Exceptions No. 2 was taken to the failure of the State to comply with appellant's motion for a bill of particulars. In this motion, appellant sought information (1) as to the exact hour and time of the commission of the offense charged in the indictment; (2) the place and locality of the offense and (3) the circumstances and facts surrounding the commission of the

offense and whether or not it took place inside a room or other part of a residence or at some definite location outside. On the same day the motion was filed, the judge ordered the district attorney to furnish the particulars requested therein by Tuesday, March 11th and fixed Thursday, March 13th for the disposition thereof. In compliance with this order, the district attorney timely filed his bill of particulars in which he set forth the information requested in paragraphs (1) and (2) of appellant's motion by stating the locality of the offense and the approximate time (2:00 p.m.) of its commission but refused to furnish the details demanded in paragraph 3 of the motion on the ground that this would compel him to disclose his evidence.

According to the per curiam attached to this bill, by which we are bound, the judge sets forth that counsel for appellant telephoned him on the night of March 12th and advised that he was not going to make any contest on the bill of particulars and that, in view of this, he ruled that this was a waiver by appellant of any objection he may have had to the particulars furnished by the State.

It appears that, on March 17th (the date set for the trial), counsel for appellant stated "Merely for the purpose of the record I wish to except to the ruling of the Court and reverse a bill and attach the motion for and answer to the bill of particulars". Yet, in this Court counsel argues, for the first time, that the judge should have required the State to furnish particulars as to the way the rape was committed.

R.S. 14:42 provides that the offense of aggravated rape is committed under any one or more of the following circumstances: (1) where the female's resistence

is overcome by force; (2) where she is prevented from resisting by threats of great and immediate bodily harm accompanied by the apparent power of execution and (3) where she is under the age of 12 years. If the motion for the bill of particulars filed by appellant had specifically requested this information, there is no doubt that the judge would have been obliged to order the State to furnish it, in view of our decision in *State vs. Holmes*, 223 La. 397, 65 So. (2d) 890, where it was held that, in a prosecution under the short form for a crime which may be committed in several designated ways, the accused is entitled, upon his request, to be informed of the specific way or ways relied on by the State. But an examination of appellant's motion for particulars reveals that he was attempting to require the State to furnish him with the details of its evidence, to which he was not entitled. *State vs. Poe*, 214 La. 606, 38 So. (2d) 359 and *State vs. Michel*, 225 La. 1040, 74 So. (2d) 207. And, while the motion is unquestionably of such broad import as to include information respecting the way in which the rape occurred, such information was neither specifically requested nor was any such demand ever directed to the attention of the trial judge. On the contrary, as stated by the judge, counsel for appellant abandoned any challenge upon the sufficiency of the answer of the State to the motion for a bill of particulars. In these circumstances, the complaint, raised for the first time in this Court, comes too late.

Bill of exceptions No. 3 was reversed to the overruling of appellant's motion for a change of venue, which was based mainly on the grounds that appellant was a young negro, a resident of Baton Rouge, who was without friends or acquaintances in Livingston Parish, charged with the aggravated rape of a well-known white woman of that Parish, who had many friends and rela-

tives therein, some of whom had already been drawn on the general venire, and that, due to the notoriety of the case through newspaper reports and word of mouth, there was so much prejudice created against him throughout the Parish, particularly because of his race, it would be impossible to secure an unbiased and unprejudicial jury which would give him a fair and impartial trial.

In his per curiam to this bill of exceptions, the judge asserts that appellant failed to prove that he could not get a fair trial in Livingston Parish; that most of the witnesses summoned by him testified to the contrary and that, in addition thereto, many prominent citizens of the parish called by the prosecution stated without equivocation that there had been no widespread antagonism against negroes generally, no mob demonstrations against appellant and that they knew of no reason why he could not obtain a fair trial in the Parish.

The burden of establishing that an appellant cannot obtain a fair trial in the parish where the crime was committed rests with him. The test is whether there can be secured with reasonable certainty from the citizens of the parish a jury whose members will be able to try the case on the law of evidence, uninfluenced by what they may have heard of the matter and who will give the accused full benefit of any reasonable doubt arising either from the evidence or the lack of it *State vs. Rini*, 153 La. 57, 95 So. 400 and *State vs. Faciane*, 233 La. 102, 99 So. (2d) 333 and authorities there cited. The power to grant a change of venue rests in the sound discretion of the trial judge, whose ruling will not be disturbed in the absence of a showing of clear abuse thereof. *State vs. Johnson*, 226 La. 30, 74 So. (2d) 402; *State vs. Swails*, 226 La. 441, 76 So. (2d) 523 and *State vs. Faciane*, *supra*. A review of the evidence

on the motion for change of venue reveals that the judge did not abuse his discretion in denying the motion.

In connection with the motio for change of venue, we note that appellant attempted to show that there was a systematic exclusion of negroes from jury service in the Parish of Livingston. This matter will be considered under appellant's Bill No. 4 which was taken to the overruling of a motion to quash the venire on this ground for, if the motion to quash is well-founded, there would be no point in discussing whether the venue should be changed.

We pass on, then, to a consideration of Bill No. 4, which, as aforesaid, was taken to the overruling of the motion to quash the general venire on the ground that there has been a systematic exclusion of negroes from jury service in Livingston Parish. The testimony of the jury commissioners is to the effect that the registration roll of the parish is generally used in selecting persons for jury duty, there being 405 negroes out of a total registration of approximately 5,000 persons and that there has never been any attempt to exclude negroes because of their race. There was one negro on the grand jury panel which indicted appellant but no negroes on the petit jury panel. There is no showing whatever by appellant that there was a practice in the past of including a token number of negroes on the venire and, indeed, nothing from which the conclusion could be drawn of a planned exclusion, the testimony being that all jurors are selected for service without any discrimination as to their race or color. The motion was, therefore, properly overruled. *Eubanks vs. State of Louisiana*, 356 U.S. 584, 78 S. Ct. 970, 2 L. Ed. (2d) 991; *State vs. Fletcher*, 236 La. 40, 106 So. (2d) 709 and *State vs. Coleman*, La. , 108 So. (2d) 534.

Bill No. 6 was taken to the overruling of a motion

in arrest of judgment. This motion was based in part on the allegation that the indictment is defective and insufficient, which we have already disposed of in our consideration of Bill No. 1. It also reiterates the proposition argued under Bill No. 2 respecting the court's ruling in holding that appellant had waived any objection he might have had to the bill of particulars furnished by the State, which we have covered in our discussion of Bill No. 2.

In addition, the motion in arrest alleges that the general charge of the judge to the jury was faulty in that he stated, in giving the mandatory list of responsive verdicts to the charge of aggravated rape, that it could find appellant "guilty or guilty as charged", which meant the same thing. Appellant's complaint is that, since Article 386 of the Code of Criminal Procedure (R.S. 15:386) lists only five responsive verdicts for aggravated rape[1] and does not include "guilty" but only "guilty as charged", the judgment should be arrested and appellant discharged.

This claim is without any substance. The jury found appellant "guilty as charged", which is a responsive verdict under R.S. 15:386. It is difficult to see how appellant was prejudiced by the judge instructing the jury that one of the five responsive verdicts was guilty or guilty as charged". If counsel had thought so, he should have perfected a bill of exceptions to the general charge.

Bills of Exceptions Nos. 7 and 8 were taken at the hearing of a motion for a new trial to the refusal of the judge to receive evidence assailing the credibility of the

[1] Guilty as charged; guilty without capital punishment; guilty of attempted aggravated rape; guilty of simple rape and not guilty.

witness, Joe Sharp, who testified for the State as an expert on the handling of bloodhounds. Appellant sought to introduce the criminal record of Joe Sharp, which revealed that he had been convicted six times for various offenses. In addition, he tendered the testimony of two witnesses, who it is alleged would state that Sharp told them after the trial that the bloodhounds could not be relied on as completely as he had made it appear in his evidence, and also that he had not found certain objects along the bloodhound trail as he had stated to the jury.

There is no merit in these bills. R.S. 15:511 sets forth the conditions under which a new trial may be granted for newly discovered evidence, declaring that it must affirmatively appear that, notwithstanding the exercise of reasonable diligence, the evidence was not known before or during the trial and that, among other things, " * * * it does not merely corroborate or impeach the credibility or testimony of any witness examined at the trial; that it is also material that it ought to produce a different result than the verdict reached, and that it is admissible."

At best, since the trial judge found that the evidence of Sharp was merely corroborative, it is doubtful that the testimony impeaching his statement would have produced a different result if it had been heard by the jury. See *State vs. Richard*, 223 La. 674, 66 So. (2d) 589.

Bill No. 9 was reserved to the overruling of appellant's objection to Joe Sharp testifying as an expert in the handling of bloodhounds. There is no testimony attached to this bill with respect to the qualifications of Sharp but the trial judge states in his per curiam that it was shown that Sharp had been handling bloodhounds for many years and that, during the last few years, he had

handled bloodhounds for the Sheriff's office in East Baton Rouge Parish and also for other sheriffs in the State.

In these circumstances, we cannot say that the judge erred in concluding that Sharp was an expert handler of bloodhounds, as presumably appellant's counsel was given a full opportunity to cross-examine the witness as to his qualifications.

Bill No. 9 contains a second portion which is levelled at the refusal of the Court to allow defense counsel the opportunity to cross-examine Deputy Sheriff C. A. Grambling concerning his personal knowledge of whether Sharp had served time in the State Penitentiary for cattle theft.

We find no error in the ruling of the judge. Impeachment of a witness by evidence of conviction cannot be done in this manner. Before proof of conviction can be adduced from any other source, it is prerequisite that the witness sought to be impeached be questioned on cross-examination as to his conviction and have failed distinctly to admit the same. R.S. 15:495.

During the course of the trial, the State called to the stand Dr. Robert Louis Fernberg, who had made an examination of the genital organs of the prosecutrix shortly after 9:00 p.m. on the day she was raped. He testified that he found male sperm in her vagina. Since counsel for appellant was contending, under the plea of not guilty, that appellant was infected with gonorrhea at the time of the offense and that, if he had intercourse with the prosecutrix, the germs of this disease would have been present or that she would have become pregnant, Dr. Fernberg was questioned as to this phase of

his examination. He testified that he did not find any gonorrhea germs in the sexual organs of the victim at the time of his examination and that this was understandable, in view of her statement to him that she had taken a douche before her visit.

Counsel for defendant extensively cross-examined Dr. Fernberg on his findings, endeavoring to show that the witness had no way of knowing whether or not the victim had sexual intercourse with another person after she was raped. When the district attorney objected to this evidence, the Court stated "That has no bearing on this case so far as I can see. You are going too much in detail." But the judge thereafter told counsel that he was not trying to curtail his cross-examination with respect to relevant evidence. Continuing on, defense counsel questioned the doctor about a disease called urethritis, described by him as an infected process of the urethral canal, which is part of the penis. After the witness had answered several questions touching on this disease, the judge sustained an objection of the district attorney as to further testimony on the urethra, remarking "I think you have gone into that in every detail possible. It all means the same thing." Despite the ruling, counsel continued to question the witness on this subject, the district attorney again objecting and the judge sustaining the objection. Following colloquy between the court and defense counsel, the latter remarked "I wish to elicit and introduce this testimony in the record in order to establish that a female alleged to have claimed to have been raped by a male who had gonorrhea —the medical examination of her should have shown the presence of gonorrhea germs along with the male sperm deposited in her female organs, as heretofore testified by this witness as her Medical Examiner." The district attorney immediately objected to this statement and the

judge then said "That has not been proved and there is no evidence here to say it." Defense counsel then said "I am offering that later" and the judge remarked "I can't see where any further testimony concerning this type of testimony in this case is needed." At this point, defense counsel reserved Bill No. 10 and he claims in this Court that the comments of the judge were comments on the facts of the case, which are prohibited by our law and entitles appellant to a new trial.

It is manifest that the first two above quoted statements of the judge cannot be characterized as comments on the facts. The record shows that counsel had been allowed to go far afield in his cross-examination. Dr. Fernberg had testified fully on the condition in which he found the female organs of the prosecutrix at the time he examined her and had answered all questions having any bearing on the case. Hence, counsel's continued prodding of the witness on the same subject and his attempts to elicit obviously immaterial evidence became amenable to judicial interference. Article 369 of the Code of Criminal Procedure (R.S. 15:369) vests the trial judge with the sound discretion to stop prolonged, unnecessary and irrelevant examination of a witness even though no objection be urged by opposing counsel. The expression of the judge that this evidence had no bearing on the case was not a comment on the facts and, in the same category, was his statement that counsel had gone into every possible detail—which was assigned as his reason for stopping counsel in his irrelevant cross-examination about urethritis.

The same may be said of the final statement of the judge, in which he told counsel that he was unable to discern that there was a need for any further evidence as to the doctor's findings on the condition of the victim's

sexual organs. Indeed, the only one of the above quoted remarks of the judge which may be characterized as a comment on the evidence in his statement, in reply to defense counsel, that the latter's claim that gonorrhea germs should have been present along with the male sperm in the victim's female organs " * * * has not been proved and there is no evidence here to say it".

It is generally understood under our law that a trial judge in a criminal case may not comment on the facts in the presence of the jury. This rule is found throughout our criminal jurisprudence which gives effect to an implied prohibition contained in Section 9 of Article 19 of our Constitution.[2] There is also statutory law on the subject but it seems to be confined to the province of the judge in instructing the jury. R.S. 15:384 states that the judge shall charge the jury on the law but not on the facts; that he shall not state or recapitulate the evidence; repeat the testimony of a witness, nor given an opinion as to the facts that have been proved or refuted.

But there is a clearly defined exception to this rule, which we think governs the case at bar. It is well settled that it is not improper for the Court to make statements which may pertain to the facts in the presence of the jury " * * * while ruling on the admissibility and effect of evidence and the validity of objections thereto * * * provided they are not unfair and prejudicial to the accused." See 23 C.J.S. Section 992. Also, 53 Am. Jur.—Trial—Section 79. This exception has been repeatedly recognized and applied by this Court. See *State vs. Walker*, 50 La. Ann. 420, 23 So. 967; *State vs. Hoffman*,

[2] That Section declares in part: "The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge."

120, La. 949, 45 So. 951; *State vs. Weathers*, 127 La. 930, 54 So. 290; *State vs. Dreher*, 166 La. 924, 118 So. 85; *State vs. Childers*, 196 La. 554, 199 So. 640; *State vs. Vernon*, 197 La. 867, 2 So. (2d) 629; *State vs. Walker*, 204 La. 523, 15 So. (2d) 874 and *State vs. Nicolosi*, 228 La. 65, 81 So. (2d) 771."

In *State vs. Childers*, *supra*, where the judge, in overruling an objection to a question propounded to a witness as to the contents of a will, stated that the witness had testified that the will he read was in the hands of the defendant, the Court quoted with approval the trial judge's per curiam to the bill in which complaint had been made that this was a comment on the evidence, as follows:

> "'No reversible error was committed by the Court for the reason that it was not a comment on the facts, but was the basis of the Court's overruling the objection made as to secondary evidence. The ruling as made did not convey to the jury any impression of the trial Court's opinion as to the guilt of either defendant. *State vs. Dreher*, 166 La. 924, page 967 (118 So. 85, page 101) (bill 36).
>
> "'It is not improper for the Court to make remarks in the presence of the jury, giving its reasons for admitting or excluding evidence, or to state the purpose for which evidence is offered or admitted, etc.' 16 C.J. 832 - Criminal Law Sec. 2101".

In *State vs. Walker*, 204 La. 523, 15 So. (2d) 874,

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[1] The cases cited by defense counsel do not take into account the exception to the general rule concerning comments on the facts. Moreover, none of these cases involved remarks made while ruling on the admissibility of evidence. In *State vs. Iverson*, 136 La. 982, 68 So. 98, the comment on the facts was made by the judge in refusing a requested charge. In *State vs. Davis*, 140 La. 925, 74 So. 201, the objectionable remark occurred while the judge was refusing to order the jury to disregard a statement made in argument by the district attorney. And in *State vs. Ballou*, 140 La. 1086, 74 So. 562, the judge made a gratuitous prejudicial remark as to the credibility of a defense witness.

where the trial judge, in explaining his ruling to defense counsel that the testimony sought to be elicited formed part of the *res gestae*, remarked "That it all took place in two or three minutes", the Court found that the comment was not of such a nature as to require the reversal of the conviction and recognized and applied the above stated exception to the general rule as to comments on the evidence. After citation of the pertinent authorities in support of its ruling, the Court said:

> "The remarks made by the trial judge were not such as would influence the jury in reaching a verdict, nor could they be construed as expressing an opinion as to the guilt or innocence of the accused."

So we say in this case that the remark of the judge, that counsel's statement in the presence of the jury (that, if the victim had been raped by a male who had gonorrhea, the medical examination should have shown the presence of gonorrhea germs along with the male sperm in her female organs) had not been proved and that there was no evidence to show it, was not such a comment as would have influenced the jury in reaching a verdict and did not in anywise constitute an expression of an opinion as to the guilt or innocence of appellant.

Under these conditions, the comment does not afford good ground for ordering a new trial. In our most recent decision on this subject, *State vs. Nicolosi*, *supra*, where it was found that the judge committed error in repeating the testimony of a witness in violation of R.S. 15:384, we nevertheless refused to grant a new trial. There, we applied the injunction contained in Article 557 of the Code of Criminal Procedure (which we think is clearly controlling under the state of facts presented here) that no new trial shall be given in a criminal case as to any

error of any matter of pleading or procedure unless it appears to the appellate court, after an examination of the entire record, " * * * that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

When appellant was called for sentence, his counsel made objection thereto on the ground that the verdict of the jury was contrary to the law and the evidence. This objection was overruled and thereupon counsel reserved Bill No. 11 and attached thereto all of his other bills, his motion in arrest of judgment and for a new trial, the court's written charge to the jury and the remainder of the entire record.

This is novel procedure under our law. It is too well settled to require the citation of authority that a motion for a new trial based on the ground that the verdict is contrary to the law and the evidence, presents nothing for review in this Court as our appellate jurisdiction extends only to questions of law and not of fact. Furthermore, we could not review the evidence in this case as all of it is not in the record.

Finally, we consider Bill No. 5, which was taken to the overruling of appellant's motion for a new trial. This motion reiterates all of the complaints tendered in the other bills of exceptions, which have been heretofore discussed and rejected and also assigns several other reasons for the granting of a new trial. One discussion will be confined to these additional reasons.

Paragraph No. 5 of the motion for a new trial was directed against the admission in evidence, over objection

of defense counsel, of a shirt and a mask identified by Joe Sharp as being worn by appellant on the day of the crime. This complaint, dealing with the admission of evidence, is not properly presented for the first time on a motion for a new trial and counsel's failure to take and perfect a bill of exceptions ordinarily would preclude a review of the alleged error by this Court. However, the district judge declares in his per curiam that the shirt and mask were received in evidence for the sole purpose of rebutting the testimony of two defense witnesses who stated that the articles did not belong to appellant. We find no error in the ruling.

Paragraph No. 6 of the motion is in the same category as complaint No. 5 and refers to the rebuttal testimony of two deputy sheriffs who said that, during their investigation of the crime, the two witnesses above referred to had told them that the particular shirt offered in evidence did belong to appellant. We see no substance in the complaint.

Allegations Nos. 12 and 13 declare that no proper identification was made of appellant in view of the fact that there was no fingerprint evidence taken nor was appellant ever placed in a "line up" and that the verdict is contrary to the law and the evidence because there was some conflict in the testimony as to the time of the attack. Suffice it to say that these arguments pertain only to questions of fact which are not within the scope of our jurisdiction.

Paragraph No. 14 alleges that the trial judge committed error in refusing to sequester three deputy sheriffs of the parish, two of whom were called as witnesses. The trial court refused to sequester the deputies because the sheriff advised him that it was necessary for the

deputies to remain in the courtroom to maintain order. While a bill of exceptions was reserved to the judge's ruling on this point it was not perfected by counsel. But, aside from this, there is no showing that the judge abused his discretion in refusing to order the sequestration of the deputy sheriffs. It is well settled that the ordering of or refusing to order sequestration of witnesses is within the sound discretion of the trial court and its action will not be disturbed unless shown to be arbitrary, unreasonable and prejudicial. *State vs. Palmer*, 227 La. 691, 80 So. (2d) 374.

Paragraph No. 15 of the motion for a new trial alleges that the prosecutrix left the courtroom on many occasions and conversed with other witnesses who were sequestered under the rule of court. The trial judge says in his per curiam that, as soon as defense counsel directed his attention to the fact that the prosecutrix was leaving the courtroom, he immediately instructed her not to do so while court was in session. There is no showing whatever as to whom she contacted while she was out of the courtroom and, in the absence of any evidence that she tried to divulge information to the witnesses under sequestration or to otherwise influence their testimony so as to prejudice appellant, the complaint made in the motion for a new trial is without substance.

The conviction and sentence are affirmed.

STATE OF LOUISIANA, PARISH OF LIVINGSTON

Twenty-First Judicial District Court

The Grand Jurors of the State of Louisiana, duly impanelled and sworn, in and for the body of the Parish of Livingston, in the name and by the authority of the said State upon their oath find and present:

That one, Andrew J. Scott

late of the Parish of Livingston, on the 19th day of October, in the year of our Lord One Thousand Nine Hundred and Fifty-seven, with force and arms, in the Parish of Livingston, aforesaid, and within the Jurisdiction of the Twenty-First Judicial District Court of Louisiana, for the Parish of Livingston,

Did commit aggravated rape upon Mrs. Larecy Blount Graham at her residence about six miles north of Corbin, Louisiana in violation of Article 42 of the Louisiana Criminal Code.

Contrary to the form of the statutes of the State of Louisiana, in such cases made and provided and against the peace and dignity of same.

s William M. Dawkins

Assistant District Attorney for the 21st Judicial District of Louisiana

No. 6537

State of Louisiana

Versus

Andrew J. Scott

INDICTMENT FOR

Aggravated Rape

WITNESSES:

A TRUE BILL

V. R. Miller, Jr.

Foreman of the Grand Jury.

FILED Dec. 6, 1958.

Bea Lea
Dy. Clerk

March 26, 1958

Guilty as Charged

N. R. Ninchen
Foreman

Filed Mar. 7, 1959
Bea Lea Dy Clerk

21ST JUDICIAL DISTRICT COURT
PARISH OF LIVINGSTON
STATE OF LOUISIANA

6537

STATE OF LOUISIANA

VS.

ANDREW J. SCOTT

MOTION TO QUASH

And now into this Honorable Court comes Andrew J. Scott, made Defendant herein and having heard the indictment read and protesting that he is not guilty of the offense set out therein, moves to quash the said indictment, filed herein, for the following reasons, to-wit:

1.

That the said indictment filed herein, is insufficient, in definite and invalid and does not charge any crime against the avove named defendants.

2.

That the said indictment fails to apprize or inform defendant of any crime against him in any manner sufficient to allow him to offer any defense or to advise him as to just what crime he is accused of having committed "in violation of Article 42 of the Louisiana Criminal Code" since he is a layman, uneducated and is in no wise familiar with the language or any juris-

prudence arising under Article 42 of Louisiana Criminal Code.

3—

That furthermore, this said indictment avers that mover acted "in violation of Article No. 42 on the 19th day of October, 1957; which covers the full period of twenty four hours (24 hrs.) during which time mover was delivering automobile tires and other auto accessories from B. F. Goodrich Service Station and retail sales department of Baton Rouge, Louisiana, over a great part of Livingston and East Baton Rouge Parish, and it would be practically impossible and extremely impractical to furnish witnesses or other evidence as to his whereabouts and actions during every hour or fraction thereof, during the entire 24 hours of this date of Oct. 19, 1957, even though he does have alibi witnesses and could get them for any particular hour or fraction of an hour.

4—

Furthermore, the Indictment avers that, this alleged violation took place "about six miles north of Corbin, Louisiana", which is indeed indefinite and confusing in several particulars, both as to directions and many respective distances, as no mention or designation of any street, public highway, country road or other named or numbered thoroughfare as leading up to or even leading along nearby, or anywhere near to the alleged residence of the alleged complainant. And the alleged location of the said alleged act "in violation of Article 42 of the Louisiana Criminal Code" in Indictment is yet made more indefinite and confusing by failure of the indictment, in any manner, to set forth definitely what part or point of location in Corbin, Louisiana, from which the direction is to be fixed and from which the approximate measure-

ment is to be made or taken. And whether or not the exact direction is to be measured directly north along a perfectly straight line extending due north and south or, north by slightly northwest or north by slightly northeast. Any slight varation of the above mentioned directions or distances would make a tremendous difference as to location of the alleged scene of the alleged offense "in violation of Article 42 of the Louisiana Criminal Code."

5—

That by the systematic exclusion of a reasonable proportion of names of qualified members of the Negro race, who are qualified legal residents of the Parish of Livingston, from the Jury list deposited in the Jury Box, the Jury Commission of this said Parish has completely deprived this Negro defendant of having members of his race serve on the Livingston Parish Grand Jury which found and returned this insufficient, indefinite and invalid Indictment against him on, or about, December 6, 1957, Which systematic exclusion of a fair and reasonalbe proportion of names of qualified Negroes is in violation of the Constitutional rights of this Negro Defendant.

WHEREFORE: the said Andrew J. Scott, prays that this Motion to Quash be filed and maintained and that the said Indictment, as to him, and as far as he is concerned, be declared null and void and ordered quashed. And that said Defendant be discharged therefrom.

ANDREW J. SCOTT
DEFENDANT

HARRY M. ENGLISH
ATTORNEY FOR DEFENDANT

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF LIVINGSTON

BEFORE ME, the undersigned authority, personally came and appeared: Andrew J. Scott who after being duly sworn, by m,e did depose and say; that he is the Defendant in the above and foregoing Motion to Quash, that he has read same, in full, and all the allegations contained therein are true and correct, to the best of his knowledge, information and belief.

ANDREW J. SCOTT
AFFIANT

Sworn to and subscribed before me this 7th day of March, 1958 at, Livingston, Louisiana.

James M. Cudd
NOTARY PUBLIC

Filed Mar. 18, 1958
Bea Lea Dy Clerk

21ST JUDICIAL DISTRICT COURT
PARISH OF LIVINGSTON
STATE OF LOUISIANA

6537

STATE OF LOUISIANA
VS.
ANDREW J. SCOTT

MOTION TO QUASH VENIRE

Now into Court comes Andrew J. Scott, made defendant herein, and on suggesting to this Honorable Court that your defendant is charged with the crime of Aggravated Rape by viture of an Indictment, returned by the Grand Jury of Livingston Parish and fixed for trial this day, and moves that this Honorable Court quash the regular Venire, drawn and selected for service during this current week of Criminal Jury term, for the following reasons, to-wit:

—1—

First, for the reasons heretofore set forth, and supporting evidence introduced and taken on the trial of Defendant-Mover's Motion for a Change of Venue, and which said motion was heard and overruled on yesterday by this Honorable Court.

—2—

That moreover, the eividence adduced and taken on the aforesaid trial or hearing of the Motion for Change of Venue and both of which are attached hereto, and made a part hereof shows and establishes conclusively, that all the thirty (30) names drawn and listed on said Regular Jury Venire are members of the white race and defendant mover has no representation, whatsoever, from his race, the Negro or colored race, drawn to serve on this said Jury Venire.

—3—

That defendant has offered and ffled this, his motion to Quash said Venire, prior to the beginning of his trial.

WHEREFORE: Defendant-Mover prays that his motion to Quash the Venire be duly filed and heard; and after all due legal proceedings had, that the Jury Venire, herein be duly quashed and all remaining unexcused veniremen drawn thereon be discharged as provided by law.

Defendant-Mover further prays for all general orders in the premises; for such judgment as the nature of the case may require and for all general relief.

Harris M. English
Attorney for Defendant-Mover

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF LIVINGSTON

Before me, the undersigned authority, personally came and appeared Andrew J. Scott who after being first duly sworn, by me, did depose and say he is, the defendant-

mover in the above and foregoing Motion to Quash Venire, that he has read same, in full, and all the allegations contained therein are true and correct.

ANDREW J. SCOTT
AFFIANT

Sworn to and subscribed before me this 18 day of March, 1958.

BEA LEA
NOTARY PUBLIC

Filed Mar. 13, 1958
Bea Lea Dy Clerk

21ST JUDICIAL DISTRICT COURT
PARISH OF LIVINGSTON
STATE OF LOUISIANA

STATE OF LOUISIANA

VS.

ANDREW J. SCOTT

MOTION FOR CHANGE OF VENUE

On motion of Andrew J. Scott, defendant herein, and on suggesting to this Honorable Court that your defendant is charged with having committed the crime of Aggravated Rape, by viture of an Indictment returned by the Grand Jury of this Parish, and moves that this Honorable Court do grant him a change of venue and removal of this cause to another Parish, in the manner and from provided by law, for the following reasons, to-wit:

1—

Your Mover avers that he has good reason to believe, and so believing, alleges that by reason of prejudice existing in the public mind against him, gowing out of articles and items of news published in the general press of the Baton Rouge newspapers, and inflamed and biased rumors against him conveying such a strong impression of guilt that, the citizens of the Parish of Livingston have become so inflamed and prejudiced against your defendant that it will be impossible to secure an unbiased jury, and it will be impossible for your defendant to secure a fair and impartial trial as is guaranteed him by

the Constitution and laws of the State of Louisiana, and of the United States of Americal.

—2—

That mover is a young Negro man and is charged with the serious and heinous crime of Aggravated Rape of a well known white lady of the Parish of Livingston which has by the very nature of the charge created a tremendous degree of prejudice against this accused throughout the entire Parish.

—3—

That furthermore, the white lady complainant is held in high regard by her many friends and acquaintances throughout the Parish of Livingston.

—4—

That the complainant is closely related, either by blood or marriage, to a large number of influential white citizens throughout this Parish.

—5—

That mover has been informed and verily believes that the Jury Commission has drawn and placed in the Jury Box of this Parish a substantial number of names by lot or chance, of the aforementioned friends and relatives of both complainant and her husband, who is also a member of a large and influential white family of this Parish. And that the regular Jury Venire already selected for the Criminal Term of this Honorable Court beginning Monday, March 17, 1958, the date the defendant is already assigned for trial likewise has the names of a substantial number of these aforementioned relatives, friends and acquaintances, who have been inflamed prejudiced

and instilled with much bias through newspaper and other reports.

—6—

Tha mover is a colored non-resident of the parish of Livingston, and is now, and has been for the grater part of his life a resident of the City of Baton Rouge, East Baton Rouge Parish, Louisiana, and has an extremely limited acquaintance in Livingston Parish, with either the white citizens, or those of his own colored race.

And his is reliably informed, and verily believes, from all the information he is able to obtain, that he is considered and looked upon as a despicalbe intruder into the Parish of Livingston by the vast majority of all citizens of this said Parish who now know him or have read any news paper account or heard any discussion, by word of mouth, concerning the alleged serious offense of "Aggravated Rape" of a white lady, who is held in high regard by her numerous friends and acquaintances together with a large number of devoted relatlves, by blood or marriage.

—7—

That mover has reason to believe, and does so believe, that by the systematic exclusion of a reasonable number of names of qualified residents of the Negro race he has been deprived of his legal rights to have a reasonable number of qualified Negroes called for Jury Service on the regular venire panel, or an any necessary tales list, which may be drawn for the Criminal Term of this Honorable Court beginning on the following Monday, March 17, 1958. And from which regular panel and tales lists of prospective jurors the selection of a Petit Jury which would serve on the trial of defendant mover would necessarily have to be made and effected, begin-

ning on the aforementioned date of trial of Monday, March 17, 1958.

—8—

That your Mover makes this application as soon as he had discovered the existence of such prejudice, and as soon as he had discovered the fact that it will be impossible for your defendant to secure a fair and impartial trial in the Parish of Livingston, and that this application is made, not for the purpose of delaying the trial of your defendant, but for the purpose of securing a fair and impartial trial. And your Mover avers that he has been duly rearraigned on the said charge, and has again pleaded "Not Guilty" upon said re-arraignemtn.

—9—

Mover shows that he has served notice, as required by law on the Honorable Duncan Kemp, District Attorney of the 21st Judicial District, advising him of your Movers' intention to apply for a Change of Venue.

WHEREFORE, your Defenadant prays that he be allowed to file this motion for a change of venue, and that this motion be assigned for trial and that he be given an opportunity to summon witnesses in support of this motion, and that after due and legal proceedings had, that he be granted a change of venue to some other Parish of the State of Louisiana, as provided by law, there to be duly tried. Defendant further prays for all general orders in the premises, for such judgment as equity and the nature of this case may require and for all general relief.

& ANDREW J. SCOTT

HARRIS M. ENGLISH

ATTORNEY FOR DEFENANT-MOVER.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF TANGIPAHOA

BEFORE ME, the undersigned authority, personally came and appeared: Andrew J. Scott who on oath deposes and says:

That the fact and allegations in the foregoing application for a change of venue have been read to him and that said facts and allegations are true and correct.

Andrew J. Scott

SWORN TO AND SUBSCRIBED BEFORE ME THIS 12 day of March, 1958.

DAVIS F. REID,
NOTARY PUBLIC

ORDER

Considering the foregoing Motion, it is ordered by the Court that Duncan Kemp, District Attorney for the Parish of Livingston, and the 21st Judicial District Court of the State of Louisiana, show cause, in Open Court on the 17th day of March, 1958. at 9:30 a.m. why a change of venue in this case should not be granted. Thus done, signed and issued, at Amite, Louisiana on the 12th day of March, 1958.

H. R. Reid
Judge 21st Judicial District
Court, State of Louisiana

UNITED STATES OF AMERICA

STATE OF LOUISIANA

SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, Monday, April 27, 1959

Court was duly opened, pursuant to adjournment. Present Their Honors: John B. Fournet, Chief Justice, Amos Lee Ponder, Joe B. Hamiter, Frank W. Hawthorne, E. Howard McCaleb, James D. Simon and Walter B. Hamlin, Associate Justices.

ACTION BY THE COURT ON APPLICATIONS FOR REHEARING

* * * * *

Rehearings were refused in the following cases:

* * * * *

44,361 State of Louisiana v. Andrew J. Scott

* * * * *

I, Harold A. Moise, Jr., Deputy Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the court aforesaid, at the City of New Orleans, this the 23rd day of July, A.D., 1959.

s HAROLD A. MOISE, JR.

Harold A. Moise, Jr.
Deputy Clerk
Supreme Court of Louisiana

(SEAL)

SUPREME COURT OF LOUISIANA

No. 44,361

STATE OF LOUISIANA

vs.

ANDREW J. SCOTT

PETITION FOR STAY OF EXECUTION OF MANDATE

To The Honorable Chief Justice And Associate Justices Of The Honorable Supreme Court Of The State Of Louisiana.

The petition of ANDREW J. SCOTT, defendant in the above numbered and entitled cause, with respect, represents:

1.

That the decree of this Honorable Court affirming the verdict and sentence of the Criminal District Court for the Parish of Livingston, Division "B", is final, this Court having refused an application for a rehearing on the 27th day of the month of April, 1959.

2.

Petitioner avers that the opinion and decree of this Honorable Court deprives him of his rights guaranteed him under Article 1, Section 2 of the Constitution of the State of Louisiana and by the 14th Amendment of the United States Constitution, and also by Act of Congress,

18 Statute 336, 8 U.S.C. 44, and that he was tried and convicted, over his protest, without due process of law, to-wit: That the petitioner is admittedly a member of the colored or Negro race, that there was no proper representation of the Negro race in the jury box or general venire list of names from which were drawn to constitute the Grand Jury, the petit jury and tales jurors list, which respectively indicted and tried defendant-petitioner, and which denied him his equal rights under the State Constitution and Federal Constitution and Statutes to the equal protection of the laws.

3.

Petitioner further avers that he was denied his common law rights and his rights under the laws of this State to have his motion to quash the indictment sustained on his arraignment or his motion to quash the array, or, regular petit jury venire, before his trial began. And that the trial and proceedings had in Division "B" of the 21st Judicial District Court of Louisiana was therefore without due process of law under the Constitution of the State of Louisiana, the 14th Amendment of the U.S. Constitution and the Act of Congress, 18th Statute 336, 8 U.S.C. 44.

4.

Petitioner avers that he timely raised the said questions in the lower Court prior to the time of his arraignment and prior to the beginning of trial respectively and after his conviction in a motion for a new trial and in this Court by his Bills of Exception and his brief in support thereof.

5.

Petitioner further avers that he is desirous of applying to the Supreme Court of the United States for

a writ of certiorari and review, or appeal, to review the decision of this Honorable Court upon the issues hereinabove raised and as shown by the record in this case; and that petitioner desires that he be given a stay or delay in which to apply to said Court; and that the decree or mandate of this Honorable Court be stayed so that petitioner will have an opportunity to so present his application to the Supreme Court of the United States for relief.

Wherefore, petitioner prays that after due consideration that this Honorable Court grant him a reasonable stay of execution and that he be permitted a delay of 90 days in which to prepare and file in the Supreme Court of the United States his application for a writ of certiorari or appeal to review the decision of this Honorable Court and that the mandate and decree of this Honorable Court be withheld accordingly.

And for all general and equitable relief.

BY ATTORNEY:
s/ HARRIS M. ENGLISH,
Harry M. English
ATTORNEY FOR PETITIONER.

Counsel for petitioner, ANDREW J. SCOTT, hereby certifies that the foregoing petition and application is made in good faith and counsel further certifies that he verily believes that petitioner is entitled in law to the relief sought.

s HARRIS M. ENGLISH,
Harry M. English
ATTORNEY FOR PETITIONER.

Andrew J. Scott.

ORDER

Let petitioner be granted a stay of execution of the decree of this Honorable Court for a period of 90 days.

THIS DONE, SIGNED AND ISSUED at New Orleans, Louisiana, on the 27th day of April, 1959.

/s/ JNO. B. FORNET,
Chief Justice

A TRUE COPY

Clerk's Office, New Orleans, April 27th, 1959.

/s/ HUGH ST. PAUL
Dy. Clerk,
Supreme Court of Louisiana.

(SEAL)

CERTIFICATE

I certify that I have served a copy of this motion and petition upon opposing counsel by mail. April 27, 1959.

/s/ HARRIS M. ENGLISH
Attorney for Petitioner

CERTIFICATE

I hereby certify that a copy of the foregoing petition and appendix has been served on opposing counsel for State of Louisiana.

New Orleans, Louisiana, July 24, 1959.

s/ HARRIS M. ENGLISH
Counsel fo Petitioner